

February 20, 2009

Commissioner Mark Holsten
Minnesota Department of Natural Resources
Box 47
500 Lafayette Road
St. Paul, Minnesota 55155-4047

Re: *In the Matter of the Trespass Citation Issued to Scott Ray Minko,*
Citation No. 164831
OAH Docket No. 3-2000-20228-2

Dear Commissioner Holsten:

The above-entitled matter came on for a prehearing telephone conference call at 2:00 p.m. on February 4, 2009. The Administrative Law Judge, Conservation Officer Matt Frericks, and Scott Ray Minko participated in the telephone conference. In addition, Mr. Peter Waldorf, the property owner, testified in support of the citation. Both parties agreed that no formal hearing would be needed and that the ALJ would make a recommendation in this matter based on the record created during the telephone conference. In addition, the parties agreed that the record would remain open until February 19, 2009, so the parties could provide photographs of the area where the incident occurred.¹

The preliminary facts are not disputed. On or about October 14, 2008, Mr. Minko was road hunting for grouse along West Long Lake Road in Fayal Township. Mr. Minko had parked his car opposite the driveway of Mr. Peter Waldorf. Mr. Minko and his dog then walked south along the road. The disputed issue in this case is whether Mr. Minko left the public roadway and entered Mr. Waldorf's property on the east side of the road.

Mr. Waldorf testified that as he was driving north on West Long Lake Road from Thunderbird Trail, he saw no sign of Mr. Minko or his dog on or near the road. As he approached his driveway, he saw Mr. Minko's car and stopped to investigate. In his rearview mirror he saw a dog, followed by Mr. Minko, emerge

¹ Exs. 3 & 4.

from the trees on the east side of the road and then turn to walk south down the road. Mr. Waldorf approached him and asked what he had been doing, and Mr. Minko replied that he was road hunting. Mr. Waldorf did not argue with Mr. Minko, but he made note of his license plate number and filed a trespass complaint against him within a few days.²

On December 2, 2008, Conservation Officer Matt Frericks went to Mr. Minko's home to notify him of the complaint. Mr. Minko stated that he was hunting on the road, but he denied that he was hunting on Mr. Waldorf's land. He also complained that the land was improperly "over-posted," meaning he believed Mr. Waldorf had posted signs on trees that Mr. Waldorf did not own. Officer Frericks issued a civil trespass citation to Mr. Minko, which Mr. Minko appealed. In his appeal letter and during the telephone conference, Mr. Minko maintained that he moved several feet off the roadway when he heard vehicles approaching from the south. He testified that if he was in fact on Mr. Waldorf's land when he moved off the road, he was not aware of it and did not intend to trespass.³

West Long Lake Road is an unpaved township road running north and south in the area at issue. Mr. Waldorf owns the land on the east side of the road where he encountered Mr. Minko. Mr. Waldorf's land is properly posted with "No Trespassing" signs at the tree line all the way along the east side of West Long Lake Road. Photographs submitted by Conservation Officer Frericks reflect that the traveled portion of the road (including the shoulder) is approximately 23 feet wide, with an additional ditch area extending about four feet on each side of the road. The average distance from the edge of the road to the tree line is approximately 10 feet.⁴ Based on information provided by the Right of Way Agent for St. Louis County, Officer Frericks reported that this road was established by prescriptive easement and that property owners retain fee ownership of all land up to the shoulder of the road.

Minn. Stat. § 97B.001, subd. 4 (2008), provides that a person may not enter, for outdoor recreation purposes, any land that is properly posted without first obtaining permission of the owner, occupant, or lessee. Because Mr. Minko acknowledges that he was engaged in grouse hunting, an activity that constitutes "outdoor recreation" under the statute, the only issue in this case is whether he left the public roadway and entered Mr. Waldorf's land.⁵ The width of a roadway established by prescriptive easement is based on the width of the road, as it historically has been used, including any adjacent shoulders and ditches actually

² Testimony of Peter Waldorf; Ex. 1.

³ Testimony of Scott Minko; Ex. 2.

⁴ Ex. 3.

⁵ See Minn. Stat. § 97B.001, subd. 1a (2008) ("Outdoor recreation" means any voluntary activity, including hunting, fishing, trapping, boating, hiking, camping, and engaging in winter sports, which is conducted primarily for the purposes of pleasure, rest, or relaxation and is dependent upon or derives its principal benefit from natural surroundings).

used to repair or maintain the traveled portion of the road.⁶ Based on the photographs submitted, it is apparent that the trees lining the roadway are densely planted up to a point about ten feet from the roadway. Whatever the exact width of the public easement may be, it must end in any case at the tree line, because no repair or maintenance activities could possibly take place past this point.

Mr. Waldorf reported consistently (in his initial complaint, in his interview with Conservation Officer Frericks, and in his sworn testimony) that he saw Mr. Minko and his dog come out of the trees and walk onto the road. Mr. Minko's report of his whereabouts was less consistent. In his appeal letter, Mr. Minko stated he was about three feet off the road, and in his testimony during the telephone conference he said he was four to five feet off the road. The photographs make clear, however, that anyone standing four to five feet off this road would be clearly visible to any passing driver. Moreover, in his initial interview with Conservation Officer Frericks, Mr. Minko asserted that Mr. Waldorf had "overposted" by placing "no trespassing" signs at the tree line, which suggests that Mr. Minko was attempting to defend a position behind the signs and in the trees.

Based on the record as a whole, the Administrative Law Judge has concluded it is more likely than not that Mr. Minko was in the trees and on Mr. Waldorf's property at the time of this incident. That Mr. Minko may not have realized he was on private property (despite the clearly posted signs) is not a defense to the violation, which does not require evidence of intent to trespass. Mr. Minko also objects to the delay between the time of this incident and the issuance of the citation (49 days), but he has not identified any prejudice resulting from this time lag. The Administrative Law Judge accordingly recommends that the Commissioner affirm civil trespass citation # 164831 and require Mr. Minko to pay the \$100 fine. I am closing our file in this matter and returning the record to you.

Pursuant to Minn. Stat. § 116.072, subd. 6(e), the Commissioner must wait at least five days after receipt of this recommendation before making a final decision. Within those five days, the person to whom the order is issued may comment on this recommendation. The Commissioner must send a copy of the final decision to Mr. Minko. If the Commissioner fails to act within 90 days after the record before the Commissioner closes, this recommendation will become the final decision in this matter.

⁶ *Town of Dell Grove v. Helwig*, 276 Minn. 139, 141, 149 N.W.2d 73, 74 (1967); *Barfnecht v. Town Bd. of Hollywood Twp.*, 304 Minn. 505, 509, 232 N.W.2d 420, 423 (1975); *Block v. Sexton*, 577 N.W.2d 521 (Minn. App. 1998). See also Minn. Stat. § 160.05, subd. 1 (2008).

Sincerely,

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

Encl.

cc: COL Ken Soring
C.O. Matt Frericks
Mr. Scott Minko
Mr. Peter Waldorf